Supreme Court, U.S.
FILED
OCT 9 1997
CLERK

(2)

No. 97-409

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RUHRGAS, A.G.,
Petitioner,

v.

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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October 9, 1997

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52 pp

QUESTIONS PRESENTED

1. Whether, in light of the prohibition against review "by appeal or otherwise" in 28 U.S.C. § 1447(d), the Court has jurisdiction over a Petition seeking review of an order that "remanded the action to the district court with instructions that the action be remanded" to the state court from which it was removed.

2. Whether there is any basis for review in the absence of any conflict among the lower courts or in view of the Fifth Circuit's holding in this case that properly refused to compel arbitration without express or implied consent.

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BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

The law governing jurisdiction could not be more clear. "An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise. . . ." 28 U.S.C. § 1447(d). Here, the Petitioner unabashedly seeks appellate review—by certiorari—of just such an order.[1] Obviously, such a review is improper in

[1] Section 1447(d)'s preclusion of review by appeal *or otherwise* encompasses review by extraordinary writs, such as the writ of certiorari. *E.g., Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (remand order unreviewable "by mandamus or otherwise"); *Volvo of Am. Corp. v. Schwarzer*, 429 U.S. 1331 (1976) (Rehnquist, C.J., as Circuit Justice denying stay because order not reviewable); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351-52 (1976) (appeal or extraordinary writ). As one

light of Congress' unmistakable and unambiguous mandate.[2]

The rationale underlying § 1447(d)'s prohibition is the need to avoid "prolonged litigation of questions of jurisdiction of the district court to which the cause [was] removed." *United States v. Rice*, 327 U.S. 742, 751 (1946); *see also* 14A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3740 at 594 (1985) ("purpose of the ban on review is to spare the parties undue delay and interruption of the litigation solely to contest a decision regarding removal"). While the order in this case is properly founded on the absence of federal jurisdiction, § 1447(d)'s unyielding prohibition on appellate review still would apply "no matter how plain the legal error in ordering the remand." *Briscoe v. Bell*, 432 U.S. 404, 414 n.13 (1977).

There can be little doubt that the interlocutory order in this case is a remand order. Even Petitioner concedes (Pet. 1) that the order leaves no discretion in the district court. *See, e.g., Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494, 496 n.2 (1995) (treating similar order on appeal from bankruptcy court as an order of remand and finding review precluded). And, the order specifically requires remand for one of the bases listed in 28 U.S.C. § 1447(c): lack of federal subject matter jurisdiction. The order, therefore, falls squarely within section 1447(d)'s prohibition. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976). Petitioner's argument regarding international principles cannot lift this plain statutory bar. Indeed, the Fourth Circuit recently came to this inevitable conclusion notwithstanding the *same* argument that international principles supposedly

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leading treatise has observed, "[e]ven on review in the Supreme Court of a state court proceeding following remand, the propriety of remand . . . cannot be questioned." 14A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3740 at 594 (1985).

[2] This motion is lodged in conformity with this Court's Rule 15(4).

require a corporate defendant to arbitrate based on an affiliate's arbitration agreements. *Severonickel v. Gaston Reymenants*, 115 F.3d 265, 266-67 (4th Cir. 1997).

Given such unambiguous precedent and such an unambiguous statute, the disposition of this Petition is not at all problematic. Respondents filed this case in Texas state court on July 6, 1995. By one procedural roadblock after another, including this improper Petition, Ruhrgas has not only delayed and denied Respondents their day in court, but has kept them from even beginning discovery on the merits. A clearer example of the evil Congress intended to avoid—delay in the trial of remanded cases by protracted litigation of jurisdictional issues—would be difficult to imagine. This Court should dismiss the Petition for want of jurisdiction.

STATEMENT OF THE CASE

A. Background

This case arises from a series of fraudulent misrepresentations, effected in part in Texas and directed specifically at Respondents, which induced them to advance hundreds of millions of dollars to develop a North Sea natural gas field and its supporting infrastructure. The pleadings allege that this infrastructure was secretly intended to provide Ruhrgas (and those acting in concert with it)[3] with complete control over the production and distribution of Norwegian natural gas.[4] The pleadings further allege that Ruhrgas and its co-conspirators exercised their control to the detriment of Respondents, ultimately causing the loss of virtually all of their investment.

Ruhrgas removed this case from state court arguing, among other things, that the Federal Arbitration Act, 9

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[3] In the 1970's Ruhrgas formed a cartel with certain other European gas buyers to control the distribution of gas from the North Sea fields. The group styled itself the "Consortium" or "Grand Alliance."

[4] Respondents' Amended Petition is reprinted as Appendix A (App. A) hereto.

U.S.C. §§ 201-08 (1994) (the "FAA"), and its international counterpart, the Convention on the Enforcement of Foreign Arbitral Awards, June 12, 1958 art. II, 3 U.S.T. 2517 (implemented at 9 U.S.C. § 201 et seq.) (the "New York Convention"), created federal subject matter jurisdiction. In connection with its removal, however, Ruhrgas filed affidavits admitting that it had "*no agreements with any of the plaintiffs*" concerning the matters stated in the pleadings. (see Appendix B hereto). This voluntary admission conclusively establishes that there was no arbitration agreement between the parties. Because the statute and the New York Convention upon which Ruhrgas relied specifically *require* such an agreement, Ruhrgas' purported basis for removal evaporated the moment Ruhrgas filed its removal papers.

In an attempt to surmount this significant obstacle, Ruhrgas argued that Respondents should be bound by an arbitration clause in a contract signed by one of their corporate affiliates [5]—even though that contract expressly defined "affiliates" and then excluded them from its arbitration clause. The District Court properly rejected Ruhrgas' assertion, but dismissed for lack of personal jurisdiction (without ever reaching Respondents' challenge to its subject matter jurisdiction). The Fifth Circuit agreed that there was no applicable arbitration agreement, reversed and remanded in view of the lack of subject matter jurisdiction, and vacated the personal jurisdiction ruling.

B. The Parties and Claims

Respondents Marathon Oil Company ("MOC") and Marathon International Oil Company ("MIOC") contend that Ruhrgas fraudulently induced them to loan hundreds of millions of dollars to develop the Heimdal field; Respondent Marathon Petroleum Norge ("Norge") contends that Ruhrgas' tortious interference diminished the value

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[5] Marathon Petroleum Company (Norway) ("MPCN"), a non-party, signed a gas sale agreement with Ruhrgas.

of its interest as a license-holder in the field.[6] The facts surrounding this dispute are long and complex; however, this Court can dispose of Ruhrgas' Petition with a single uncontested fact: MOC, MIOC and Norge are not now, and have never been, parties to *any* arbitration agreement with Ruhrgas.

SUMMARY OF THE ARGUMENT

Even if this Petition were not procedurally deficient, it still should be denied because none of the criteria for granting certiorari have been met. First, the lower courts' rulings are completely consistent with numerous decisions of this Court and other federal and state courts that uniformly have held that a party can be *compelled* to arbitrate its claims only if it previously has *agreed* to arbitrate those claims. Thus, this case presents no conflict among the Circuits. Secondly, the lower courts' rulings do not impinge upon any "international principle" so as to require intervention by this Court. To the extent there is an international consensus on the issue of arbitrability, it is in accord with the Fifth Circuit's ruling.

REASONS FOR DENYING THE WRIT

I. NO CONFLICT EXISTS AMONG LOWER COURTS.

No Circuit conflict exists here. The Fifth Circuit's decision is consistent with holdings from each of the Circuits to address the question of whether arbitration can be compelled on the basis of a corporate affiliation. This Court and other Circuits have held that arbitration can be compelled only if the party consents to arbitration or if it can be bound to the contract by accepted principles of

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[6] Ruhrgas' assertion that this is a simple breach of contract suit arising from its failure to abide by a gas sales agreement is, thus, a material misrepresentation of Respondents' claims.

contract, agency or corporate law (*i.e.*, veil piercing).[7] In the absence of some such indication of consent, arbitration cannot be compelled without violating the litigant's rights, among other things, to select its forum and to a trial by jury. Petitioner offered neither pleading nor proof of any such grounds below, as the District Court recognized.[8]

II. RUHRGAS HAS TESTIFIED IT HAS NO AGREEMENT WITH RESPONDENTS.

In an early attempt to distance itself from Respondents' claims, Ruhrgas unequivocally admitted in sworn

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[7] *See, e.g., Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991) ("The law compels a party to submit his grievance to arbitration only if he has contracted to do so.") (quoting *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974)); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion . . . ."); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19-20 (1983) (requiring parallel claims to remain in litigation despite arbitration involving other parties on same claims); *Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 795 F.2d 1111, 1116-18 (1st Cir. 1986) (non-signatory not bound absent proof of "meeting of the minds" on arbitration); *Thomson-C.S.F., S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 80 (2d Cir. 1995) (limited theories of contract and agency law did not apply to bind non-signatory); *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1512 (3d Cir. 1994), *aff'd*, 514 U.S. 938 (1995) (non-signatory not bound under alter ego, agency theories); *Swensen's Ice Cream Co. v. Corsair Corp.*, 942 F.2d 1307, 1310 (8th Cir. 1991) (execution of guarantee did not bind non-signatory to separate agreement with arbitration clause); *Ralph Andrews Prod., Inc. v. Writers Guild of Am., West*, 938 F.2d 128, 130 (9th Cir. 1991) (non-signatory not bound as alter ego); *see also* 1 WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43.85 (perm. ed. rev. vol. 1990); 11 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 8.4 (1995).

[8] "The incorporation by reference, assumption, and agency principles certainly do not apply in the instant case. Furthermore, Ruhrgas has not made any allegations that MPCN is the alter ego of any of the plaintiffs." Pet. App. D-11.

affidavits filed with its removal papers that it had *no* agreements, arbitrable or otherwise, with Respondents:

> Ruhrgas AG has never entered into any agreement with any of the plaintiffs concerning gas produced from the Heimdal field or *any matters* which are the subject of the First Amended Petition filed by the Plaintiffs in this action.[9]

Throughout this case, it has remained undisputed that MOC, MIOC and Norge never agreed or otherwise consented to arbitrate their claims.

Moreover, the unambiguous terms of Ruhrgas' contract with Respondents' affiliate, MPCN, indicate that neither Ruhrgas nor MPCN even attempted to bind their corporate parents or other affiliates to the terms of that contract's arbitration.[10] Tellingly, the contract's preamble does not define "MPCN" or "Ruhrgas" to include their affiliates. It does, however, acknowledge the existence of such corporations, and even goes so far as to define the term "Affiliate" to mean any parent corporation of the parties, and any corporation of which such parent owns at least 50% of the voting shares. Having acknowledged and defined "Affiliate," the contract refers to that term only twice: in ¶ 7.4 to provide that any independent consultant appointed by the Buyers cannot be an employee or "Affiliate" of the Buyers; and in ¶ 14.3.2 to provide that any appointed expert cannot be an employee or "Affiliate" of either party to the contract. Most importantly, Article 15, which contains the contract's arbitration provisions, does not apply to any of the contracting parties' "Affiliates."

If the parties had intended to bind their affiliates as Ruhrgas now claims, they certainly could have provided

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[9] Declaration of Lutz K. Eckert 5 (emphasis added); reprinted at Appendix B.

[10] Relevant sections of the contract are reprinted at Appendix C.

as much in the contract. Instead, being fully aware of the distinct corporate entities involved, they chose to identify their affiliates with precision for some limited purpose and then to *exclude* any reference to them in any substantive contractual provision, including the arbitration provision. By their own terms, these unambiguous provisions exclude Respondents from any application of MPCN's arbitration clause.[11] Under universally accepted rules of contract construction, it must be presumed that this exclusion of affiliates was deliberate.[12] Even general federal policies favoring arbitration "cannot serve to stretch a contractual clause beyond the scope intended by the parties." *Beckham v. William Bayley Co.*, 655 F. Supp. 288, 291-92 (N.D. Tex. 1987).

III. NO INTERNATIONAL PRINCIPLE SUPPORTS RUHRGAS OR REQUIRES REVIEW.

Because it has no arbitration agreement with Respondents, Ruhrgas urges that this Court should nevertheless compel arbitration based on a vague "international principle" that trumps well-settled United States jurisprudence. According to this argument, all of Ruhrgas' affiliates[13]

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[11] *See Mowbray*, 795 F.2d at 1116 (finding arbitration provision inapplicable where parties to contract were aware of third-party but excluded it from arbitration clause); 17A C.J.S. *Contracts* § 312 (1963). Even if there were some ambiguity, which there is not, the contract would have to be strictly construed *against* Ruhrgas, the contract's principal draftsman. *See Mastrobuno v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

[12] *See Taylor v. Investors Assocs., Inc.*, 29 F.3d 211, 215 (5th Cir. 1994) (adopting opinion of district court) (omission of party from contractual arbitration clause should be considered purposeful); 17A C.J.S. *Contracts* § 312 (1963); *see also Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419-20 (11th Cir. 1990) ("The Courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties.").

[13] This conceivably would include the corporations that are major shareholders of Ruhrgas, including Esso, Mobil, Shell and British Petroleum.

and all of MPCN's affiliates would be deemed to have consented to arbitration and implicitly to have waived their respective rights to trial by jury. In support of this alleged rule, Ruhrgas continues to dust off (and misread) an English translation of a single intermediate French decision. Of course, as the district court observed, French law has no conceivable application to this action. Moreover, as explained below, that decision, when carefully read, would not support Ruhrgas' argument even as a matter of French civil law.

Among other serious shortcomings, Ruhrgas' "international principle" argument suffers from the following fatal defects: (1) the initial question of *whether there is an agreement* to arbitrate is resolved as a question of United States contract law separate from the question of *how* any such clause should be interpreted; (2) it is contrary to actual international law, which requires each party, corporate or otherwise, to consent to arbitration before being required to arbitrate; and (3) notwithstanding Ruhrgas' suggestion that the decision below breaks new ground that will somehow create an international commercial crisis, the decision tracks international law and allows any party seeking arbitration to do so under ordinary legal principles of contract or agency.

A. United States Law Determines Arbitrability.

Whether a contract's arbitration clause requires arbitration of a given dispute is a matter of contract interpretation, which is to be performed by the court. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986). "[T]he first task of a court asked to compel arbitration . . . is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).[14] The federal policy favoring

[14] *Mitsubishi* and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) offer no support to Ruhrgas' arguments because in each case the parties had *agreed* to arbitrate.

arbitration pertains only to the scope of any arbitration agreement, not to the preliminary question of whether such an agreement exists. *E.g., First Options of Chicago v. Kaplan,* 115 S. Ct. 1920, 1924 (1995); *Morewitz v. West of England Ship Owners Mutual Protection & Indem. Ass'n,* 62 F.3d 1356, 1365 (11th Cir. 1995) ("[w]e are unaware of any federal policy that favors arbitration for parties who have not contractually bound themselves") (quoting *In re Talbott Big Foot, Inc.,* 887 F.2d 611, 614 (5th Cir. 1989)).[15]

This inquiry into whether a contract exists between the parties is governed by ordinary rules of contract, not broad policies, international or otherwise, favoring arbitration. *First Options of Chicago, Inc. v. Kaplan,* 115 S. Ct. 1920, 1924 (1995); *Thomson,* 64 F.3d at 776; *Morewitz,* 62 F.3d at 1364-65; *Tropical Cruise Lines, S.A. v. Vestas Ins. Co.,* 805 F. Supp. 409, 412-13 (S.D. Miss. 1992). Of course, Ruhrgas starts with the admission that it has *no* agreements with Respondents. And, as discussed, *supra,* ordinary rules of contract further establish that Ruhrgas intended to exclude Respondents from the application of its gas sales agreement with MPCN.

B. The New York Convention Requires a Written Agreement.

The New York Convention expressly requires "*an agreement in writing* under which *the parties* undertake to sub-

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[15] Ruhrgas cites Justice Breyer's decision for the First Circuit in *Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Systems Co.,* 643 F.2d 863, 869 (1st Cir. 1985), which stated that an arbitration clause that *arguably* governs a dispute should be sent to arbitration in view of the federal policy favoring arbitration of disputes. Of course, the parties there had agreed to arbitration, and the opinion recognized the need for such agreement: "To allow a federal court to enjoin an arbitration proceeding which is *not* called for by the contract interferes with neither the letter nor the spirit of [the FAA]." *Id. at* 868 (emphasis in original).

mit to arbitration all or any differences." New York Convention, Art. II. 1. (*emphasis added*). An "agreement in writing" is defined as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Id.*, Art. II. 2. Congress, in implementing the New York Convention and providing the basis for Ruhrgas' attempted removal, merely required that arbitration agreements be enforced in conjunction with the Federal Arbitration Act. Thus, under the New York Convention, as elsewhere, arbitration is strictly "a creature of contract." *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334 (5th Cir. 1987) (court cannot rewrite agreement of the parties); *International Shipping Co., S.A. v. Hydra Offshore, Inc.*, 675 F. Supp. 146 (S.D.N.Y. 1987), *aff'd*, 875 F.2d 388 (2d Cir. 1989), *cert. denied*, 493 U.S. 1003 (1989) (only parties to contract containing arbitration clause can be compelled to arbitrate under the Convention). Because none of Respondents have contracted for, or consented to, arbitration—in writing or otherwise—the plain language of the New York Convention and the statute implementing it cannot compel arbitration here.

C. International Law Requires Consent.

Contrary to Ruhrgas' assertions, "international" precedent supports this established American rule. Ruhrgas argued below that Germany would be a convenient forum, but it has failed to cite here the German rule that non-executing parties are not bound to an arbitration agreement.[16] The so-called "group of companies doctrine" is not applicable to arbitration under German law, based on

[16] *See* Peter Schlosser, *Schiedsrichterliches Verfahren* in FRIEDRICH STEIN, 7/2 KOMMENTAR ZUR ZPO § 1034 (21st ed. 1994); Ottoarndt Glossner, *Le droit allemand de l'arbitrage*, in L'ARBITRAGE, TRAVAUX OFFERTS AU PROFESSEUR ALBERT FETTWEIS 199, 200 (Lambert Matroy and Georges de Leval, eds. Brussels, 1989) ("L'ARBITRAGE").

the principle that legal entities are separate and individual, even if economically connected. The leading German authority on arbitration law expressly rejects the notion of binding an affiliate based on an arbitration agreement between a related company and a third party.[17] The same rule applies in other European countries that have considered the issue.[18]

The French *Dow*[19] case is not to the contrary. The defendant compelled to arbitrate in *Dow* had consented to arbitration in a written contract; the question before the court was whether the plaintiff parent corporations could *voluntarily* participate in an arbitration between the contract's signatories.[20] Thus the case does not endorse,

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[17] Schlosser, *id.*

[18] *E.g.*, Belgium If one company is bound by an arbitration clause, other non signatory members of a group of companies are not bound. Lambert Matray, *Le droit belge de l'arbitrage*, in L'ARBITRAGE 231, 235.

France The general principle is that non signatories are not bound; exceptions are fact specific and being part of a "group of companies" is not enough. Roger Perrot, *Le droit francais de l'arbitrage*, in L'ARBITRAGE 249, 250.

Italy "Related" parties that are not signatories are not bound; does not recognize "group of companies" doctrine. Giuseppe Tarzia, *Le droit italien de l'arbitrage*, in L'ARBITRAGE 255, 257.

The Netherlands The issue has not been addressed. Albert Jon von der Berg, *Le droit neélandois de l'arbitrage*, in L'ABITRAGE 265, 267.

Switzerland To be bound by an arbitration clause, an entity must agree to be bound or give a power of attorney to be bound. Pierre Lalive, *Le droit suisse de l'arbitrage*, in L'ARBITRAGE 279, 281.

[19] *Dow Chem. v. Isover Saint Gobain*, Cour d'Appel Paris 21, October 1983, 110 J. 899 (1983) IX Yearbook 132 (1984).

[20] The remaining U.S. cases cited by Ruhrgas involve similar situations in which the nonsignatory is included because it consents in court.

even as a matter of French law, the notion that arbitration can be imposed without consent.[21] Instead, the parent companies in that case, unlike Respondents, voluntarily sought to bring their claims in arbitration against a defendant who already had consented to arbitrate.

D. The Fifth Circuit Opinion Does Not Impair International Commerce.

Ruhrgas argues from a Note Verbale and an *amicus* brief of the Federal Republic of Germany that the international aura of this case somehow demands Supreme Court review. This argument ignores the analysis required for arbitrability under the FAA and the Convention. That Ruhrgas has managed to wield sufficient influence within the German government to obtain such supplemental briefing does not create arbitrability.[22] Moreover, the facts adduced below demonstrate that Respondents' claims have created no commercial crisis in practice or theory. In terms of the German natural gas market, the Heimdal production is negligible.[23]

Nor do Respondents' claims undermine commercial negotiations. The reality of international commerce is that large international corporations such as Ruhrgas contract with full knowledge of corporate relationships and wield sufficient economic power to demand express

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[21] And even that holding has been criticized in Europe. *See* ADAM SAMUEL, JURISDICTION PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, U.S. AND WEST GERMAN LAW 103 (Swiss Institute of Comparative Law, Zurich 1989).

[22] The German supplemental briefs merely attest to Ruhrgas' substantial influence within the German government. During discovery, Ruhrgas admitted that its representatives had met with the German government to discuss the case.

[23] The Ruhrgas manager charged with North Sea gas purchases testified below that Heimdal gas accounts for only 0.5% of Ruhrgas' purchases. Ruhrgas admitted that its gas supply from *all* Heimdal producers is ***minimal***.

terms regarding what entities are bound.[24] It is no threat to commerce if the terms of such contracts are enforced and if U.S. courts follow the law of every European country that has considered the issue. Ruhrgas' proposed "principle" is far more ominous, as it would inject uncertainty as to party identity into virtually every multinational agreement.

And it is no threat to international commerce for Ruhrgas to appear in a Texas court. While Ruhrgas now argues that Texas is a "distant" and "unfamiliar forum" (Pet. at 6), it neglects to mention that it has permanently stationed employees in Houston, Texas and entered into an agreement with Tenneco for a substantial interest in a Texas-based corporation.[25] Ruhrgas boasted in its own annual report that this interest (in the Fifth largest gas marketing company in the United States) would allow Ruhrgas to "participate in the growth of the gas marketing business in the USA" and to "make money in the [U.S. gas marketing] business." Moreover, a related noncompetition agreement with Tenneco in which the parties divide the North American gas distributing market confirms that Ruhrgas understands the vagaries of corporate affiliation and is fully capable of including them in agreements where it so intends.

Ruhrgas clearly contracted to insulate its own shareholders, including Esso, Mobil and Shell. Now it attempts, buttressed by its governmental patron, to avoid the result of its own draftsmanship and the consequences of its tortious acts. This invocation of "international principles" cannot transform a garden variety state court fraud and inter-

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[24] This is particularly true here, where the Agreement was provided to MPCN as a virtual *fait accompli*.

[25] In addition to these United States connections, Ruhrgas owns, directly or indirectly, the American Meter Company, the world's largest gas meter manufacturer, based in Pennsylvania, as well as a number of other American companies, including Kromschoder, Inc., LOI, Inc., Hauck Manufacturing, and Centaur Vacuum.

ference action into a federal case.[26] Ruhrgas invites this Court to create a new rule of law—contrary to all prior U.S. and European precedent—that would force a U.S. corporation to arbitrate its claims abroad even though it never has agreed or otherwise consented to submit to arbitration. This Court should decline that dubious invitation.

CONCLUSION

For the reasons stated, the Petition for Certiorari filed by Ruhrgas, A.G. should be denied.

Respectfully submitted,

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October 9, 1997

[26] *See, e.g., Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 809 (5th Cir. 1992) (presence of foreign corporations does not lift state law claims into "rarefied realm of foreign relations").

APPENDICES

APPENDICES

APPENDIX A

[Filed Aug. —, 1995]

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
152D JUDICIAL DISTRICT

No. 95-32957

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,
Plaintiffs,

v.

RUHRGAS, A.G.,
Defendant.

PLAINTIFFS' FIRST AMENDED PETITION

Plaintiffs Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S (collectively "Plaintiffs" or "Marathon") assert the following claims against Ruhrgas, A.G.

PARTIES

1. Marathon Oil Company is an Ohio corporation that maintains its principal office at 5555 San Felipe, Houston, Harris County, Texas 77056.

2. Marathon International Oil Company is a Delaware corporation that maintains its principal place of business at 5555 San Felipe, Houston, Harris County, Texas 77056.

3. Marathon Petroleum Norge A/S ("MPN") is a Norwegian corporation that maintains its principal

office at 5555 San Felipe, Houston, Harris County, Texas 77056.

4. Defendant Ruhrgas, A.G. ("Ruhrgas") is a German corporation that maintains its principal office at Huttropstr. 60, 45138 Essen, Germany. Among other connections to Texas, Ruhrgas owns a 20% interest in Texas-based Tenneco Oil Compay. This defendant has done business in the State of Texas within the meaning of § 17.042 of the Texas Civil Practice and Remedies Code, out of which a portion of this suit arises, but has not designated an agent upon which service of process may be made. Pursuant to the Hague Convention, Ruhrgas may be served by delivering two copies of this petition, translated into German, to Der Justizminister des Landes Nordrhein-Westfalen, D 4000 Duesseldorf, Germany. The Minister of Justice then will forward this petition to Ruhrgas. Alternatively, Ruhrgas may be served in accordance with Texas Civil Practice & Remedies Code § 17.041, *et seq.*, which deems the Secretary of State to be Ruhrgas's agent.

VENUE

5. Venue is proper in Harris County pursuant to Tex. Civ. Prac. & Rem. Code § 15.007 because the defendant is a foreign corporation with no agent or representative in this state, and certain of the plaintiffs reside in Harris County. Furthermore, some of the causes of action alleged in this petition arose, in whole or in part, in Houston, Harris County, Texas.

FACTUAL BACKGROUND

6. This case arises out of a conspiracy among Ruhrgas, Den Norske Stats Oljeselskap A.S. ("Statoil"), and others to monopolize the Western European market for natural gas. Pursuant to this conspiracy, Ruhrgas participated in a series of interconnected wrongful

acts relating to the solicitation for funding, development and subsequent operation of gas fields in the North Sea off the coast of Norway. The wrongful conduct alleged in this petition has been continuing for many years, has caused continuing injury to Plaintiffs, and still is ongoing. Plaintiffs are seeking to recover the damages they have sustained over the years as a proximate result of Ruhrgas' continuing torts.

History of Gas Developments in the North Sea

7. In order to appreciate the nature and extent of Ruhrgas' wrongful conduct, one first must understand the historical factors leading up to the development of gas in the North Sea. From the mid-1960's to the early 1970's, the largest source of natural gas for the Western European market was the Groningen field in Holland. Between 1965 and 1974, this field serviced a steadily growing demand for natural gas in Holland, France, Belgium and West Germany. By 1975, however, Gasunie (the Dutch state-owned gas company) had determined that the Groningen field would be insufficient to meet Holland's future needs if gas exports continued. As a result, Gasunie began to phase out its natural gas exports, leaving gas buyers in Western Europe scrambling to find a stable new source of high-quality gas.

8. Although both the Soviet Union and Algeria had gas in exportable quantities, many Western European buyers did not consider these sources stable enough for long-term dependence due to the political climates in those countries. Instead, the most promising source for Western Europe's long term natural gas needs were gas reserves located beneath the North Sea. Most of these reserves had not, however, been commercially developed as of the mid-1970's, and were located so far from any coastline that develop-

ment and transportation would be expensive, if not prohibitive.

9. Ownership of the North Sea gas reserves was divided between Norway and Great Britain by treaty. By the early 1970's, Great Britain already was producing some North Sea gas for its own domestic consumption, as was Norway to a lesser extent. Norway's natural gas operations were conducted by Statoil, Norway's state owned oil and gas company.

10. Statoil saw the Western European gas demand as creating a potential bonanza for itself. If Statoil could develop the North Sea fields and locate a long-term, reliable purchaser for large amounts of gas, Statoil could become Western Europe's primary gas supplier and reap tremendous profits for years to come.

Ruhrgas' Conspiracy with Statoil

11. Ruhrgas is Germany's largest gas company, controlling more than 80% of the German market for natural gas. In the 1970's, Ruhrgas, along with several other gas buyers, formed a cartel known as the "Consortium" or the "Grand Alliance." The goal of this Ruhrgas-led Consortium was to divide up the European gas market among themselves and control the distribution of gas throughout the European continent. Once Gasunie began decreasing its exports of natural gas, Ruhrgas and its Consortium immediately turned to Statoil as a potential supplier.

12. Following a series of closed door meetings and negotiations, Statoil agreed to sell the vast majority of its North Sea gas to Ruhrgas and its Consortium, and the parties jointly launched a plan to monopolize the Western European gas market. Pursuant to this plan, the few Norwegian North Sea gas fields then in operation were to be linked by a pipeline known as "Norpipe" to a gas facility owned by Ruhrgas in

Emden, Germany. Thus Ruhrgas would be able to control the distribution of all gas then being produced in the southern portion of the North Sea.

13. Both Ruhrgas and Statoil knew that the few fields producing North Sea gas in the mid-1970's never would provide enough gas to satisfy the Western European market. In order to monopolize that market, Ruhrgas and Statoil would have to ensure a stable supply of gas for years to come by tapping into potentially large but still undeveloped gas reserves further north. For Ruhrgas' and Statoil's plan to succeed, platforms to exploit such reserves would have to be funded and developed, and a new pipeline would have to be constructed to connect the new fields to the Norpipe system (and thus to Europe through Ruhrgas' facility in Emden). Unfortunately, developing gas fields in the North Sea is an incredibly expensive proposition. Thus, the conspirators sought to interest other companies, including Marathon, in sharing the costs associated with developing the northern fields, building platforms, and constructing a gas pipeline system to transport the gas to Emden.

The Development of Heimdal

14. One of the undeveloped North Sea fields was the Heimdal gas field. In 1972, Pan Ocean Oil, Ltd. had discovered the Heimdal gas field in Norway's portion of the North Sea. The Heimdal field was declared commercial in 1974, roughly the same time that Gasunie informed its Western European gas buyers that they would have to look elsewhere for natural gas. At the time, Pan Ocean planned to connect the Heimdal field (which had only marginal gas reserves) to a neighboring field via a short pipeline, and then ship the gas to Great Britain through an existing pipeline. In 1975 Statoil exercised an option to take a 40% equity interest in Heimdal and

entered into an Operating Agreement with, *inter alia*, Pan Ocean Oil Norge A/S, Pan Ocean's Norwegian subsidiary, to develop the field.

15. Marathon acquired Pan Ocean in 1976, and with it a 24% interest in the field. Marathon's acquisition made it Heimdal's second-largest equity interest holder and a joint venture partner with Statoil. Marathon also acquired Pan Ocean Oil Norge A/S, which held the license to Heimdal, and subsequently renamed the company Marathon Petroleum Norge A/S.

16. In the late 1970's and early 1980's, Statoil and Ruhrgas were seeking to obtain control of the sale and distribution of gas from three North Sea fields: Heimdal, Gulffaks and Statfjord. Only with all three fields committed, and with the financial commitment of the licensees of each (including MPN), could enough money be raised to build a pipeline to link these northern regions (and other potential Norwegian reserves even further north) to Ruhrgas' Emden facility. Thus Ruhrgas and Statoil plotted to obtain a commitment from Marathon, and others to commit the funds necessary to enable them to effect their monopolistic scheme.

17. Shortly after MPN became a venture partner, Statoil suggested that Heimdal be connected to the European continent rather than to Great Britain. Such a connection would require the construction of a new and longer pipeline (later called "Statpipe") to connect Heimdal to the existing Norpipe system, which conveniently landed at Ruhrgas' facility in Emden. Statoil proposed that the cost of constructing such a pipeline be recouped from the joint ventures by means of a high transportation charge or "tariff" on all gas flowing through the pipeline until the construction costs were recovered.

18. Naturally, Plaintiffs were concerned about bearing such a cost (particularly given that a pipeline to

Britain would have been cheaper), but Statoil assured Marathon that the venture partners would be able to charge a premium price for Heimdal gas that would be more than sufficient to offset the tariff costs. Such a premium price was essential—given the high costs associated with developing the Heimdal field, and the relatively small amount of gas in the field, only a premium price would provide an adequate return on investment sufficient to justify the cost of development.

19. In order to convince Plaintiffs and the Heimdal joint venture partners that they would be assured of obtaining the required premium price, Statoil began "negotiating" with potential gas buyers before any substantial funds were committed to develop the field. Of course, Statoil's talks centered primarily, if not exclusively, on Ruhrgas and the Consortium. Ruhrgas and its Consortium agreed to pay the Heimdal venturers a premium price if the field were developed and connected to the Norpipe system. Indeed, Ruhrgas and the Consortium even signed a "Heads of Agreement" promising to pay the venturers a formula then yielding $5.50 per million BTU's ($6.16/mcf) for Heimdal gas. Such a price would have provided the venturers with a sufficient premium to economically develop the field and pay the Statpipe tariff. Based on these oral and written assurances, Marathon agreed to provide their subsidiaries and affiliates with sufficient capital to enable them to fund the development of the Heimdal field and to support the proposed Statpipe pipeline.

Ruhrgas' and Statoil's Secret Agreements

20. During the negotiations leading up to Ruhrgas' representations and agreements to purchase gas at a premium price, Statoil and Ruhrgas representatives conducted several secret meetings. Upon information

and belief, and Ruhrgas agreed that Statoil would force the Heimdal venturers to sell the gas to Ruhrgas and the Consortium through a pipeline to be connected to Ruhrgas' facility at Emden. The Heimdal venturers would be "locked" into the Ruhrgas pipeline system with no other means of selling their gas. Marathon, of course, never was told of this secret agreement.

21. Based on Ruhrgas' representations and agreements, Marathon advanced over $300 million to their subsidiaries and affiliates for the development of the Heimdal field. Statoil and Ruhrgas never disclosed to Plaintiffs: (a) that they were attempting to monopolize the Western European gas market and prevent sales to any other gas buyers; (b) that connecting Heimdal to Europe (instead of Great Britain) through Ruhrgas' Emdeen facility was part of their overall monopolistic plan; or (c) that Ruhrgas never intended to pay the promised premium price for gas. Had Marathon been told of these facts, Marathon never would have advanced any funds for the development of the Heimdal field and the support of Statpipe, and MPN could have recovered its capital investment in the Heimdal license.

22. Also unbeknownst to Plaintiffs was the fact that Statoil had discovered a huge gas reserve north of Heimdal that ultimately became known as the Troll field. The Troll field was forty times larger than Heimdal, and had the potential of providing Statoil and Ruhrgas with the gas necessary to permit them to realize their goal of monopolizing the Western European gas market.

Ruhrgas Uses Coercion to Lower Gas Prices

23. After discovering the Troll field, Statoil began negotiating a gas sales contract with Ruhrgas and the Consortium to cover the new gas. Statoil was anxious

to obtain a long-term commitment for the sale of Troll gas. Ruhrgas, in turn, wished to (1) lower *all* North Sea gas prices to boost its monopoly profits, and (2) obtain the rights to all Norwegian reserves for the Consortium to assure a stable supply for its monopoly for many years to come. In secret negotiations these conspirators reached an agreement to commit Troll gas to Ruhrgas at a much reduced price (initially around $2.201 per mcf), and Ruhrgas induced Statoil to commit to lower North Sea gas prices at all other Norwegian fields, including Heimdal. Statoil made its decision to lower all North Sea gas prices for Ruhrgas' benefit despite the fact that Marathon and others had made, and were continuing to make, enormous investments in developing the Heimdal field based on the assurance of premium prices.

24. Following Statoil's secret agreement to lower all North Sea gas prices to the Troll level, Ruhrgas immediately demanded that all Heimdal licensees lower their gas prices because the Troll price allegedly had set the market price for North Sea gas. When Marathon's affiliate refused to lower the gas price from the agreed-upon premium amount, Ruhrgas and the other Consortium members simply continued taking Heimdal gas from Ruhrgas' Emden facility but began paying less for it.

25. By the time Ruhrgas and the other Consortium members began these wrongful acts, Marathon was trapped. The Heimdal gas reserves (and any hope of recovering on the loans and the value of the license) were locked into a single pipeline that transported its gas to a facility completely controlled by Ruhrgas. When the possibility of securing non-Consortium buyers was raised in light of Ruhrgas' flagrant wrongful conduct, Ruhrgas advised that it would not allow any such purchasers to access Heimdal gas. In other words, Marathon's affiliate

was forced to choose selling its gas to Ruhrgas at a loss, or not selling its gas at all.

26. In response to the breach of the gas sales agreement by Ruhrgas and the Consortium, the Marathon affiliate that had entered into the contract with the Consortium initiated arbitration. The arbitration resulted in a finding that Ruhrgas and most Consortium members were obligated to pay the proper and agreed-upon contract price for the Heimdal gas.

27. The arbitration was not a total victory, however: another Consortium member (Distrigaz, the Belgian state gas company) was excused from performing under its contracts, leaving Plaintiffs without a buyer for approximately 15% of the gas. Thus, although initially victorious over Ruhrgas, the net result from arbitration still left Marathon's affiliates operating at a substantial loss. Furthermore, Ruhrgas expressly advised that it would not permit the Distrigaz volumes to be sold to any competitor of the Consortium.

28. Ruhrgas appealed the arbitration award and indicated that it would seek relief under a "hardship" clause of its gas sales contract because the Troll price allegedly had lowered the market value for North Sea gas. (In other words, through its conspiracy with Statoil, Ruhrgas effectively had lowered the market price for all North Sea gas. It then claimed that it suffered a hardship (and would lose money) by having to pay more than this new "market" price.).

29. Given Ruhrgas' threats and its obvious ability to control the sale of all of the gas from Marathon's license, Marathon and its affiliates were left with no choice but to accede to Ruhrgas' demands. Faced with this economic coercion from Ruhrgas acting from its controlling position in the Western European

gas market, Marathons' affiliate agreed to an amendment of the gas sales contracts that provided for a reduction in the sales price over a period of time beginning in 1992 that ultimately would reach the Troll price level. The negotiations leading up to this agreement, along with the economic coercion described above, took place in Houston, Harris County, Texas.

Statoil's Representations Induced Marathon Into Not Filing Suit

30. In the course of the negotiation with Ruhrgas and the Consortium, Marathon considered further litigation against Ruhrgas to recover the damages up to that point. Statoil, however, assured Marathon that once the Troll field was in production and its gas was flowing through Statpipe, tariff prices would decline and thereby assuring Marathon that it investment would improve. Statoil provided projections indicating that Troll would be connected to Statpipe, that gas volumes flowing through Statpipe necessarily would increase, and that the tariff on all gas flowing through the pipeline correspondingly would decrease. These projections were sent to Marathon in Houston, Texas. Based on Statoil's assurances, Marathon refrained from further litigation with Ruhrgas.

31. Unfortunately, Statoil only told Marathon half of the story. Upon information and belief, Statoil and Ruhrgas had not agreed to ship the Troll volumes through Statpipe. In fact, Statoil had determined to ship gas from its newer gas fields through a separate pipeline system bypassing Statpipe. Thus Statoil either negligently misrepresented or fraudulently represented to Marathon that this gas would be available to lower the Statpipe tariff.

32. Statoil continued to send projections to Marathon in Houston, Texas for several years that indicated the

Troll field would be connected to Statpipe and that tariffs then would decrease. Earlier this year, however, Statoil announced for the first time that Troll would *not* be connected to Statpipe—instead, its gas would be transported to Europe through a new pipeline. Thus Statoil and Ruhrgas have left Marathon and its affiliates to continue incurring debilitating losses without any reduction in expenses as promised. Had Statoil not made misrepresentations to Marathon regarding increased shipments of gas through Statpipe and the related cost reductions, Plaintiffs would have filed this action years ago.

Plaintiffs' Damages

33. As a result of these wrongful activities, Marathon have suffered, and continue to suffer, tremendous losses. Furthermore, given that Marathon now will be unable to repay any of the advances Ruhrgas induced Marathon to make to develop the Heimdal field and support Statpipe, Marathon will suffer and recognize a loss of its capital investment this year. To add insult to injury, Statoil has attempted to take advantage of its wrongful acts and conspiratorial activities by offering to purchase MPN's license in Heimdal for a nominal price and thus freeze Plaintiffs out of the field they helped develop. The result of Ruhrgas' wrongful acts is to render MPN's license virtually worthless.

34. Ruhrgas' and Statoil's actions as alleged above were (and are) part of a single ongoing plan aimed at controlling the Western European gas market and duping others into funding the development of North Sea gas fields and pipeline systems for Statoil's and Ruhrgas' benefit. The wrongful activities of Ruhrgas and Statoil have been continuing for years, and continue to effect additional injury to Plaintiffs every day: in addition to the staggering loss of the initial

investment, Plaintiffs are incurring substantial losses each month on the Heimdal operations.

35. Both Statoil and Ruhrgas fraudulently concealed their secret agreements from Marathon. Had Plaintiffs known the truth about Ruhrgas' and Statoil's relationship and plans, they never would have agreed (1) to commit hundreds of millions of dollars to develop the Heimdal field, and (2) to support a pipeline to Europe that landed in a facility controlled by Ruhrgas.

CAUSES OF ACTION

FRAUD

36. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.

37. As part of its continuing tortious activity, Ruhrgas made numerous material misrepresentations to Marathon. Among other things, Ruhrgas represented to Marathon that it would pay a premium price for Heimdal gas in exchange for (a) Marathon's agreement to fund the development of the Heimdal gas reserves; (b) Marathon's support for connecting Heimdal to Ruhrgas' facility in Emden; and (c) Marathon's agreement to help underwrite the construction costs for Statpipe.

38. Ruhrgas never intended to honor its promises to pay a premium price for Heimdal gas. To the contrary, Ruhrgas merely promised to pay such prices to induce Marathon to fund the development of the field and the construction of a pipeline to Emden. Ruhrgas always intended to pay a lower price once the pipeline was constructed and there was then no other avenue for selling the gas.

39. Ruhrgas intended that Plaintiffs would act upon these misrepresentations by advancing the funds necessary to develop Heimdal, and Plaintiffs justifiably relied upon such misrepresentations to their detriment. Had Ruhrgas not made these misrepresentations, Plaintiffs never would have advanced any funds for the Heimdal field's development.

40. As a proximate result of Ruhrgas' fraud, Plaintiffs sustained actual damages in an amount far in excess of this Court's jurisdictional limits, for which Plaintiffs now sue.

41. Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have known, that its conduct created an extreme degree of risk and peril to Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial catastrophe for Plaintiffs. Accordingly, Plaintiffs sue for punitive damages in an amount of at least four times their actual damages.

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIPS

42. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.

43. From the inception of the Heimdal field's development, and particularly after Ruhrgas demanded a price renegotiation, Marathon's affiliate sought to identify and establish relationships with European gas buyers other than Ruhrgas and the Ruhrgas-led Consortium.

44. In response, Ruhrgas representatives told Marathon that Ruhrgas would not allow the Heimdal gas to be transported through its facilities to any competing gas buyer.

45. Ruhrgas has made good on its threat. To date, it has refused to permit non-Consortium buyers to access the gas originally allocated to the Consortium under the gas sales agreements. This interference has been continuous and still is on-going. For example, Ruhrgas now is refusing to recognize the termination of the gas sales contract between the parties, and is refusing to provide certain necessary gas transportation cost information to enable a sale to other buyers.

46. Marathon's affiliate had (and has) a reasonable probability of entering into business relationships with other gas buyers. Ruhrgas maliciously and intentionally prevented (and still is preventing) those relationships from occurring. Ruhrgas' purpose in interfering with these prospective relationships is to harm Plaintiffs, and Ruhrgas is not privileged or justified in such interference.

47. As a proximate result of Ruhrgas' tortious interference as alleged above, Plaintiffs have sustained, and continue to sustain, actual damages in an amount far in excess of this Court's jurisdictional limits, for which they now sue.

48. Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have known, that its conduct created an extreme degree of risk and peril to Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial catastrophe for Plaintiffs. Accordingly, Plaintiffs also sue for punitive damages in an amount of at least four times their actual damages.

PARTICIPATION IN BREACH OF FIDUCIARY DUTY

49. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.

50. As alleged above, Statoil and MPN are joint venture partners. This relationship gives rise to formal fiduciary duties owed by Statoil to MPN.

51. As a result of its relationship with Statoil, MPN trusted and relied on Statoil, and was justified in placing confidence in the belief that Statoil would act in MPN's best interest. Accordingly, MPN's relationship with Statoil was a confidential and special relationship, as well a formal fiduciary relationship.

52. Among other things, Statoil owed MPN a duty to fully disclose all material facts, a duty not to seek an advantage for itself at MPN's expense, a duty of loyalty, and a duty of good faith dealing. Statoil's breaches of fiduciary duties to MPN have been continuous, and have caused MPN continuous injury. Examples of steps taken by Statoil include, among other things:

    a) agreeing to lower all North Sea gas prices to assist Ruhrgas, contrary to the promises it had made to Plaintiffs and to Plaintiffs' detriment;

    b) conspiring with Ruhrgas to monopolize the market for North Sea gas to Plaintiffs' detriment;

    c) providing projections showing that Troll gas would flow through Statpipe when Statoil knew, or should have known, that those projections were erroneous; and

    d) failing to disclose its agreements with Ruhrgas that necessarily worked to Plaintiffs' detriment.

53. Ruhrgas was aware that Statoil and MPN were joint venturers, and that Statoil owed fiduciary duties to MPN. Nevertheless, Ruhrgas knowingly aided, abetted, induced, and/or participated in the breach of Statoil's fiduciary duties as alleged above. Accordingly, Ruhrgas is jointly and severally liable for any damages Plaintiffs sustained as a result of Statoil's breaches of fiduciary duty.

54. As a proximate result of Statoil's breaches of its fiduciary duties, and Ruhrgas' participation in those breaches, Plaintiffs sustained actual damages in an amount far in excess of this Court's jurisdictional limits, for which Plaintiffs now sue.

55. Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have known, that its conduct created an extreme degree of risk and peril to Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial catastrophe for Plaintiffs. Accordingly, Plaintiffs also sue for punitive damages in an amount of at least four times its actual damages.

CONSTRUCTIVE FRAUD

56. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.

57. Ruhrgas' participation in Statoil's breaches of fiduciary duties constitute the breach of both legal and equitable duties owed to Plaintiffs. Such breaches are constructively "fraudulent" because of their tendency to deceive others, violate confidence, and injure public interests.

58. As a proximate result of Ruhrgas' constructive fraud, Plaintiffs have sustained actual damages in an amount

far in excess of this Court's jurisdictional limits, for which they now sue.

CIVIL CONSPIRACY

59. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.

60. Ruhrgas and Statoil conspired between themselves and with others to (i) fraudulently induce Marathon to fund the development of the Heimdal field, (ii) lower North Sea gas prices generally, and then (iii) force Marathon to accede to such prices, by means of misrepresentations, improper threats, breaches of fiduciary duty, and fraud. This plan was accomplished through the fraud, breaches of fiduciary duties, and other actions alleged above. This conspiracy was designed to result in:

a) Marathon committing over $300 million to develop the Heimdal gas field and subsidize a European pipeline;

b) Statoil having a guaranteed long-term buyer for gas produced in its Troll field;

c) Ruhrgas and Statoil controlling the price and distribution of Heimdal gas;

d) Ruhrgas being able to purchase gas from all North Sea fields at lower prices than provided in its contracts;

e) Ruhrgas and Statoil effectively controlling the flow of gas from major North Sea fields and monopolizing the sale of North Sea gas in Western Europe;

f) Statoil using Plaintiffs and other gas producers to fund the construction of an undersea pipeline

to Europe (for Statoil's and Ruhrgas' benefit) through excessive tariffs;

g) Ruhrgas and Statoil attempting to prevent, restrict or distort competition by, among other things, directly or indirectly fixing prices, and limiting or controlling markets; and

h) Ruhrgas and Statoil abusing a dominant position within the market.

61. Ruhrgas and Statoil conspired among themselves and others to accomplish both (a) unlawful purposes and (b) lawful purposes through unlawful means as alleged above. Both Ruhrgas and Statoil have committed, and continue to commit, numerous overt acts in furtherance of this conspiracy, including the breaches of fiduciary duties and misrepresentations previously alleged. Accordingly, Ruhrgas is jointly and severally liable for all damages sustained by Plaintiffs due to this civil conspiracy.

62. As a proximate result of Ruhrgas' and Statoil's civil conspiracy, Plaintiffs have sustained actual damages in an amount far in excess of this Court's jurisdictional limits, for which they now sue.

63. Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have known, that its conduct created an extreme degree of risk and peril to Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial catastrophe for Plaintiffs. Accordingly, Plaintiffs also sue for punitive damages in an amount of at least four times their actual damages.

JURY DEMAND

64. Plaintiffs request that this matter be decided by trial jury, and hereby tender the required jury fee.

WHEREFORE PREMISES CONSIDERED, Plaintiffs pray that this matter be placed on the Court's jury docket, and that after a trial on the merits, the Court enter judgment awarding Plaintiffs:

(1) Actual damages;

(2) Punitive damages of not less than four times actual damages;

(3) Prejudgment and post-judgment interest allowed by law;

(4) Costs of Court; and

(5) Such other and further relief as to which Plaintiffs are entitled.

Respectfully submitted,

/s/ Clifton Hutchinson
CLIFTON T. HUTCHINSON
State Bar No. 10347500
DARRELL E. JORDAN
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Attorneys for Plaintiffs
Marathon Oil Company,
Marathon International
Oil Company, and
Marathon Petroleum
Norge A/S

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. ———

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,
Plaintiffs,

vs.

RUHRGAS, A.G.,
Defendant.

DECLARATION OF LUTZ K. ECKERT

I, Lutz K. Eckert, declare as follows:

1. I am more than 21 years old; I have never been convicted of a crime involving moral turpitude; and I am competent in every respect to give this declaration. The matters stated herein are based upon my personal knowledge.

2. Ruhrgas AG is a corporation organized under the laws of the Federal Republic of Germany with its principal place of business in Essen, Germany. I hold the position of Head of the Legal Division in Ruhrgas AG.

3. Ruhrgas AG is engaged in the purchase and resale of natural gas in Europe. Ruhrgas AG purchases natural gas from various producing areas in Western Europe and Russia and sells it to regional and local distribution companies and industry in the Federal Republic of Germany as well as to gas companies in neighboring European countries.

4. One of the sources of supply of gas for Ruhrgas AG has been the Heimdal Field in the North Sea off the coast of Norway. Ruhrgas AG has purchased gas produced from the Heimdal Field from various producers, including Marathon Petroleum Company (Norway) ("MPCN"). Specifically, Ruhrgas AG, together with other buyers, has purchased gas produced from the Heimdal Field from MPCN under an agreement dated March 2, 1984 and an amendment thereto dated May 11, 1990 (collectively "the Agreement"). Attached hereto as Exhibit "1" is a true and correct copy of the Agreement. All of the Heimdal Field gas purchased by Ruhrgas AG from MPCN is covered by the Agreement.

5. Ruhrgas AG has never entered into any agreement with any of the Plaintiffs concerning gas produced from the Heimdal Field or any of the matters which are the subject of the First Amended Petition filed by the Plaintiffs in this action.

6. Attached hereto as Exhibit "2" is a true and correct copy of a letter dated July 21, 1995 from Marathon Oil Company to Ruhrgas AG, which enclosed a copy of Plaintiffs' Original Petition. The July 21, 1995 letter attached hereto as Exhibit "2" was the first notice received by Ruhrgas AG of the filing of this action. That letter was received by Ruhrgas AG on July 24, 1995.

7. Attached hereto as Exhibit "3" is a true and correct copy of a letter dated July 21, 1995, from MPCN to Ruhrgas AG.

8. Attached hereto as Exhibit "4" is a true and correct copy of the 1994 Annual Report of Marathon Petroleum Norge A/S. Attached hereto as Exhibit "5" is a true and correct translation of Exhibit "4" into English. The 1994 Annual Report from Marathon Petroleum Norge A/S shows that the rights and obligations of Marathon Petroleum Norge A/S under Norwegian Production License

036 (Block 25/4) "have been exercised and performed by Marathon Petroleum Company (Norway) under Pass Through Agreements dated June 25, 1975 and October 23, 1978."

9. Attached hereto as Exhibit "6" is a true and correct copy of the Statutory Accounts of Marathon Petroleum Norge A/S for 1993 and 1994. Attached hereto as Exhibit "7" is a true and correct translation of Exhibit "6" into English. The Statutory Accounts show that Marathon Petroleum Norge A/S had no operating activities in 1993 or 1994.

10. Attached hereto as Exhibit "9" is a true and correct copy of a telex from Marathon Oil Company to Ruhrgas dated December 8, 1986, notifying Ruhrgas that MPCN's Norway office was closed and that all formal communications should be directed to MPCN in Houston. MPCN has not changed these instructions.

11. Den Norske Stats Oljeselkap A.S., which is commonly known as "Statoil," is Norway's state-owned oil and gas company. Attached hereto as Exhibit "10" is a true and correct copy of an excerpt from a brochure entitled "Norwegian Petroleum Activity—Fact Sheet 95" published by Norway's Ministry of Industry and Energy which confirms that Statoil is 100% state-owned.

12. Attached hereto as Exhibit "A" is a true and correct copy of Statoil's Articles of Association taken from Statoil's Annual Report and Account 1994.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 18 August, 1995, in Essen, Germany.

/s/ Lutz K. Eckert
LUTZ K. ECKERT

[Attachments Omitted in Printing]

APPENDIX C

HEIMDAL GAS

SALES AGREEMENT

between

Marathon Petroleum Company (Norway)
Utenlandsk Aksjeselskap

and

Districaz S.A.
Gaz de France
Gelsenberg AG
Gewerkschaft Brigitta
N.V. Nederlandse Gasunie
Ruhrgas AG
Thyssengas GmbH

Date: 2 March 1984

ARTICLE 1

* * * *

1.1 *Definitions*

Except where the context otherwise indicates the following terms shall have the meanings ascribed to them in this Article 1 and include the plural as well as the singular:

* * * *

(3) "Affiliate" shall mean any parent company or corporation of the Seller or any of the Buyers which owns directly or indirectly fifty (50) per cent or more of the shares of such Party carrying voting rights, and any company or corporation other than such Party of which such parent company or corporation or such Party owns directly or indirectly fifty (50) percent or more of the shares carrying voting ights.

* * * *

7.4 *Buyers' Consultant*

At request from the Buyers in relation with a determination made according to Article 2.3.4, the Seller shall provide an independent consultant appointed by the Buyers with all data specified in Appendix G section 3 necessary to allow the consultant to make an independent evaluation of a Reference DCQ as contemplated in Article 2.3.4.

In the event that the Buyers, prior to or subsequent to such period when a consultant may be provided with data according to the preceding paragraph, reasonably require more information than presented by the Seller pursuant to Appendix G section 1, they shall have the right, for their own purposes, to appoint an independent consultant to whom the Seller shall provide all necessary data specified in Appendix G section 3

to allow the consultant to make an independent assessment of the reservoir and its performance. However, such right shall not be exercised more than two (2) times.

However, in addition, in the event that the future availability of gas is significantly affected as contemplated in Article 2.3.5, fourth paragraph, or in Article 2.4, third paragraph, the Buyers may request the Seller to provide the consultant with information specified in Appendix G section 3.

In order to enable the Buyers to assess whether or not they should request a determination pursuant to Article 2.3.4, the Buyers shall have the right to request the Seller to provide the consultant with information specified in Appendix G section 3(b), which right shall not be exercised more often than seven (7) times. Each time the consultant has been provided with information in connection with this Article 7.4, first paragraph, shall be counted against such seven (7) times.

The appointment of any independent consultant is subject to the acceptance of the Seller. Such acceptance shall not be unreasonably withheld. No person shall be appointed as a consultant under this Article 7.4 who at the time of appointment is an employee of any of the Buyers or any Affiliate or subsidiary of any of the Buyers or of any company with which any of the Buyers has a direct significant financial interest.

The consultant shall treat all the information he has received from the Seller as confidential and shall divulge to the Buyers only his conclusions and the extent to which they show differences, if any, from the Seller's presentation.

All expenses and fees of the consultant shall be borne by the Buyers.

It is recognized by the Buyers that the right granted by this Article 7.4 is only exercisable jointly by the Buyers in respect of all sellers to them of Processed Gas from the Heimdal Field Reservoir.

Such assessment by the consultant shall not be binding upon the parties.

* * * *

14.3.2 Conflicting Interest

Any person appointed as an expert shall before accepting such appointment fully disclose any interest or duty he has or may have which conflicts or may conflict with his function under such appointment, and he shall also fully disclose any such interest or duty incurred at any time before he gives his determination under such appointment, provided always that no person shall be appointed an expert who at the time of appointment is an employee of either Party or of any Affiliate or subsidiary of either Party or of any company with which either Party has a direct significant financial interest.

* * * *

ARTICLE 15

15. RESOLUTION OF CLAIMS AND DISPUTES

All claims, disputes and other matters arising out of or relating to this Agreement which the Parties are unable to resolve by mutual agreement within forty-five (45) days of the date the dispute first arose, except those matters that are to be referred to an expert in accordance with the terms and procedures set forth in Article 14 hereof, shall exclusively and finally be settled by arbitration in Stockholm, Sweden, in accordance with the Rules of Conciliation and Arbitration

of the International Chamber of Commerce in Paris or, in the absence of any applicable rule, with the Procedural Laws of Sweden.

Unless otherwise agreed by the Parties such arbitration shall be conducted by three (3) arbitrators, one (1) selected by each Party and the third arbitrator nominated by the arbitrators so selected within thirty (30) days after the appointment of the second arbitrator. The third arbitrator shall act as the chairman of the board of arbitration and shall be fully educated and trained to be a lawyer. The arbitration proceedings shall be conducted in English.

Any arbitral award shall be enforceable in accordance with the rules of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Judgment upon the award rendered may be entered in any court or other authority having jurisdiction or application may be made to said court or other authority for a judicial acceptance of the award and an order of enforcement, as the case may be.

* * * *

Marathon Petroleum Company
(Norway)
Utenlandsk Aksjeselskap

/s/ [Illegible]

Distrigaz S.A.
/s/ [Illegible]

Gaz de France
/s/ [Illegible]

Gelsenberg AG
/s/ [Illegible]

Gewerkschaft Brigitta
/s/ [Illegible]

N.V. Nederlandse Gasunie
/s/ [Illegible]

Ruhrgas AG
/s/ [Illegible]

Thyssengas GmbH
/s/ [Illegible]